RANJIT SINGH TARAM SINGH A

v.

QUAH POH KEAT & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[CIVIL SUIT NO: S2-22-862-2006]
4 JANUARY 2008

LEGAL PROFESSION: *Practice of law - Practice and etiquette - Advocate and solicitor not to accept brief if difficult to maintain professional independence - Legal Profession (Practice and Etiquette) Rules 1978, r. 5 - Whether applicable* C

LEGAL PROFESSION: *Practice of law - Practice and etiquette - Advocate and solicitor not to appear in a case where he is a witness - Client acting against employee on advice of legal firm - Employee meeting and receiving advice from senior partner of legal firm - Same legal firm subsequently retained to represent client in civil suit brought by employee - Whether senior partner of legal firm personally involved - Whether senior partner of legal firm likely to be a witness to material and disputed facts - Whether proximity of senior partner to other lawyers within the same legal firm raised a conflict of interest and duty - Whether legal firm ought to be disqualified from representing client - Legal Profession (Practice and Etiquette) Rules 1978, r. 28* D E

The plaintiff was removed by the defendants as a partner of KPMG ('the defendants' firm') following allegations of sexual misconduct. The plaintiff sued the defendants for unlawfully and illegally excluding him from the partnership. The plaintiff also filed an application to disqualify the legal firm of M/s Lee Hishammuddin Allen & Gledhill ('LHAG') from acting as solicitors for the defendants. The plaintiff claimed that LHAG had been fully involved in all processes leading to the exclusion of the plaintiff. The plaintiff averred that a partner of LHAG had been present during the defendants' EXCO meeting which subsequently decided on the plaintiff's position in the defendants' firm. Further, he had met one Datuk Naban ('DN') – a senior partner of LHAG – who had advised him to leave the defendants' firm. The plaintiff claimed that the lawyers from LHAG, DN and other members of LHAG were material witnesses in the plaintiff's suit against the defendants and a conflict of interest situation would arise. The lawyers from LHAG were not independent and were in breach of their duty to F G H I

A the court and to their client, said the plaintiff. The plaintiff submitted that LHAG was caught by rr. 5(a) and 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the 1978 Rules').

B **Held (allowing the plaintiff's application with costs):**

(1) The plaintiff's association with DN was strictly on a professional basis. There was no evidence to suggest that there existed between the plaintiff and LHAG the situation envisaged by r. 5(b) of the 1978 Rules. Rule 5(b) of the 1978 Rules thus C did not apply in the instant case. (para 8)

(2) It was apparent that the defendants' decision to exclude the plaintiff from the partnership arose out of allegations made against the plaintiff. It was reasonable to presume that the action against the plaintiff would not have been taken unless D the defendants were satisfied as to the validity of the allegations made against the plaintiff. It was also reasonable to presume that the defendants' action against the plaintiff reflected the advice given to them by LHAG. The facts upon which action was taken against the plaintiff by the defendants were material E facts and disputed facts. (para 10)

(3) As a result of the meeting and discussion between the plaintiff and DN, DN became personally involved and was likely to be a witness of material and disputed facts. *Sykt Pengangkutan Sakti* F *Sdn Bhd v. Tan Joo Khing* (foll); *Paruvathy Palany v. Sathiasealan Govindasamy* (foll); *Wee Choo Keong v. Pendakwa Raya* (refd); *Public Prosecutor v. Vengadasalam & Ors.* (refd). (paras 11, 12 & 13)

(4) DN was senior partner of LHAG. The firm of LHAG was G retained, not individual lawyers. The proximity and relationship between DN and other counsel in LHAG thus raised a conflict of interest situation. *Lee Kam Sun v. Ho Saw Lin & Anor* (refd); *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing* (foll); *Public Prosecutor v. Vengadasalam & Ors.* (foll). (para 14)

H **Case(s) referred to:**

Afkos Industries Pty Ltd v. Pullinger Stewart (A Firm) [2001] WASC 69 ***(refd)***
Lee Kam Sun v. Ho Sau Lin & Anor [1999] 4 CLJ 507 HC ***(refd)***
Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC ***(refd)***
PP v. N Vengadasalam & Ors [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893 I *HC* ***(refd)***
Shankar RP Asnani v. Stanley Eddy [2004] 2 CLJ 604 HC ***(refd)***
Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 HC ***(foll)***

Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Anor [2007] 3 CLJ 230 CA ***(refd)***
Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 HC ***(refd)***
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(refd)***

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 5(a), (b), 28(a)

For the plaintiff - James Culaz; M/s Culaz & Assocs
For the defendants - Lambert Rasa-Ratnam (Sean Yeow Huang-Meng with him); M/s Lee Hishamuddin Allen & Gledhill

Reported by Andrew Christopher Simon

JUDGMENT

Aziah Ali J:

[1] The plaintiff filed an application *vide* encl. 5 to disqualify M/s Lee Hishammuddin Allen & Gledhill (LHAG) from acting for the defendants in this action. The plaintiff prays for the following:

a) An order that M/s Lee Hishammuddin Allen & Gledhill be disqualified from acting as solicitors for defendants.

b) Costs of this application be borne by the defendants.

[2] The plaintiff was at all material times a partner in the firm known as KPMG. The plaintiff instituted this action against the defendants for unlawfully and illegally excluding the plaintiff from the partnership of KPMG. The action taken by the defendants against the plaintiff stemmed from an allegation of sexual misconduct made by one female employee of the defendants against the plaintiff. LHAG advised the defendants in this matter. The plaintiff alleges that the procedures, acts and conduct undertaken by the defendants in removing him from the partnership is unlawful and illegal. After considering the various affidavits and hearing submissions I allowed the application. The defendants now appeal against this decision.

[3] Briefly the reasons put forward by the plaintiff for the application are that the firm of LHAG has been fully involved in all processes leading to the exclusion of the plaintiff. A lawyer from LHAG identified as Mr Lim Heng Seng, a partner in LHAG, was present during the defendants' Executive Committee (EXCO)

meeting attended by plaintiff and his counsel where the allegations made against the plaintiff were raised and the plaintiff was asked to respond. The EXCO subsequently made a decision regarding the plaintiffs position in the defendants' firm (see plaintiffs affidavit encl. 4 para. 3 and defendants' affidavit encl. 6 para 8.3).

[4] The plaintiff says he was instructed by the third defendant to meet Datuk Naban, senior partner in LHAG. At this meeting the plaintiff says Datuk Naban told him that he has no chance against the defendants' firm. According to the plaintiff Datuk Naban had told the plaintiff to leave the defendants' firm. In the words of the plaintiff Datuk Naban had told him 'to pack his bags and leave' (see plaintiff's affidavit encl. 4 para 4 and 5 and encl. 6 para 24).

[5] The plaintiff says that these acts show that LHAG and Datuk Naban have clearly formed an opinion as to the allegations made against him even before an inquiry had been commenced against the plaintiff. The plaintiff avers that by these acts, the lawyers from LHAG and Datuk Naban and other members of LHAG are material witnesses in the plaintiff's suit against the defendants and a conflict of interest situation will arise (see encl. 4 para 8, 10, 11). Counsel for the plaintiff further submits that by making it known to the plaintiff their stand in respect of the plaintiff's position in the partnership of KPMG, the lawyers from the firm of LHAG are not independent and are in breach of their duty not only to the court but also to their client. The plaintiff says the acts or omissions of LHAG and the actions taken by the defendants which are at the heart of the question in issue were based on the advice given by LHAG. According to the plaintiff in the real sense LHAG is defending its actions or advice. Therefore LHAG should be disqualified from acting for the defendants. Plaintiff says the defendants will not be represented with the objectivity and independence which they are entitled to as the court demands. This failure will compromise the integrity of the judicial process. Plaintiff's counsel submits that LHAG are caught by the provisions of r. 5(a) and r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 (the 1978 Rules). Counsel refers to, among others, the cases of *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing* [1997] 3 CLJ 754; *Afkos Industries Pty Ltd v. Pullinger Stewart (A Firm)* [2001] WASC 69; *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113 and *Lee Kam Sun v. Ho Sau Lin & Anor* [1999] 4 CLJ 507.

[6] Counsel for the defendants submits that the courts are always slow to interfere with the right that a party has to be represented by counsel of his choice and a strong case must be made out before counsel is prevented from acting. The mere fact that the plaintiff asserts that the defendant's counsel will be a witness is not by itself sufficient for disqualification (*PP v. N Vengadasalam & Ors* [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893; *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345).

[7] With regard to r. 5 of the 1978 Rules, according to counsel for the defendants r. 5(b) clarifies the situations that r. 5(a) is intended to cover. According to counsel, in this case LHAG had never advised or acted for the plaintiff, whether in this matter or other matter (*Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Anor* [2007] 3 CLJ 230). Therefore counsel submits that rule 5 does not apply. The plaintiff on the other hand says that during his tenure as partner in KPMG he had on numerous occasions worked closely with LHAG and in particular with Datuk Naban and that he has had a very close and cordial working relationship with Datuk Naban during the consultancy works they had embarked on professionally.

[8] Rule 5 of the Legal Profession (Practice and Etiquette) Rules 1978 provides as follows:

> 5. No advocate and solicitor to accept brief if difficult to maintain professional independence.
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> (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
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> (b) (i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.
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> (ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

The affidavits show that the plaintiffs association with Datuk Naban and LHAG is strictly on a professional basis. The plaintiff himself says that he has a cordial, close working relationship with Datuk Naban. There is no evidence to suggest that there exist between the

plaintiff and Datuk Naban or between the plaintiff and LHAG the situation as envisaged by r. 5(b). Therefore in my opinion the nature of the cordial, *albeit* close, working relationship between the plaintiff and Datuk Naban or his relationship with LHAG does not fall within the context of r. 5(a). On this issue I agree with the defendants' counsel's submissions that r. 5(a) does not apply in this case.

[9] With regard to r. 28(a) the defendants do not deny the Involvement, of Mr Lim Heng Seng in the EXCO meeting (see encl. 7 para 4). Neither do they deny the meeting between the plaintiff and Datuk Naban. What Datuk Naban told the plaintiff is not disputed (see para 3.8 of defendants' written submissions marked 'B'). However counsel for the defendants submits that the sole issue is whether plaintiff was wrongfully excluded from the partnership of KPMG. Therefore what Datuk Naban may or may not have told the plaintiff and the opinion of Datuk Naban is wholly irrelevant and that Datuk Naban is not a material witness to any disputed question of fact. Similarly it is submitted that the opinion of LHAG is completely irrelevant. It is not denied that LHAG advised the defendants (see defendants' written submissions marked 'B' at para 3.3 and 3.4). However counsel submits that at all material times LHAG acted as solicitors for KPMG, not the plaintiff. Plaintiff was never a client of KPMG. There is no rule that a solicitor that had advised a party prior to a legal proceeding cannot continue to act for that party in subsequent legal proceedings. Counsel further submits that the counsel appearing in this case is not Datuk Naban but Mr. Lambert Rasa-Ratnam and Mr Sean Yeow. It is submitted that even if Datuk Naban could not act it does not mean that another counsel from LHAG cannot act (*Shankar RP Asnani v. Stanley Eddy* [2004] 2 CLJ 604).

[10] I agree with the defendants' counsel that the issue in the plaintiffs action is whether the plaintiff was wrongfully excluded from the partnership of KPMG. However it is also apparent that the defendants' decision to exclude the plaintiff from the partnership arises out of allegations made against the plaintiff. These allegations formed the basis for the defendants' action. It is reasonable to presume that the action against the plaintiff would not have been taken unless the defendants' were satisfied as to the validity of the allegations made against the plaintiff. It is also reasonable to presume that the defendants' action against the plaintiff reflects the advice given to them by LHAG. The facts upon which action was taken against the plaintiff by the defendants are material facts and these are disputed facts. The plaintiff contends that the allegations are not true (see para 8.3(i) of encl. 6).

[11] Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 provides as follows: A

> 28. Advocate and solicitor not to appear in a case where he is a witness.
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> (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interest. B C
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> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.
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> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in a matter in which he acts or appears. D

In the case of *Sykt Pengangkutan Sakti Sdn Bhd (supra)* Abdul Malik Ishak J (as he then was) in his judgment referred to the case of *PP v. N Vengadasalam & Ors* [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893; which was decided by Lim Beng Choon J where His Lordship had said as follows: E

> It is undesirable for an advocate to appear as a Counsel in a trial when he is required to be a material witness, if an advocate, knowing that he is going to be a material witness, insists on appearing as Counsel in the case, the presiding Court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial. F
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> Lim Beng Choon J after reviewing certain Indian authorities had this to say at p. 902 of the report: G
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> > Although I have lifted the injunctive order restraining Mr. SP Annamalai from defending the three accused persons, nevertheless, perhaps learned Counsel would like to reconsider whether it would be wise for him to continue to defend his clients. Should it turn out that, in the midst of testifying, his evidence is quite material, he would have to retire and his clients would be left in the lurch, and what is worse is that he may find himself open to a charge of misconduct. H

Abdul Malik Ishak J also referred to the judgment of Wan Yahya J in the case of *Wee Choo Keong v. PP* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346; as follows: I

Wan Yahya J (who later rose as FCJ) watered down the rigours of r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 in *Wee Choo Keong v. Pendakwa Raya* [1990] 2 MLJ 239. This was what His Lordship said:

> This section to my mind does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in Court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact.

The facts in the case of *Sykt Pengangkutan Sakti Sdn Bhd (supra)* briefly show that the plaintiff sent a motor van JCY 5932 for repairs at the defendant's workshop. There was delay in repairing the motor van. The plaintiff wanted to take the motor van from the defendant's workshop but the defendant refused to accede unless the plaintiff settle RM1,267. The plaintiff engaged Mr Gana Muthusamy, an advocate and solicitor. He proceeded to the defendant's workshop and spoke to the defendant and tried to persuade the latter to release the motor van belonging to the plaintiff with an undertaking by the plaintiff to settle all charges payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. The trip to the defendant's workshop proved futile. Mr Gana Muthusamy then issued a notice to the defendant demanding the release of the motor van within three days failing which the matter would be referred to the court. The learned counsel for the defendant raised a preliminary objection to the effect that the law firm of M/s Gana Muthusamy & Co should not appear on record as solicitors for the plaintiff since Mr Gana Muthusamy would be called as a witness by the defendant. Counsel for the defendant also argued that not only Mr. Gana Muthusamy ought not to appear for the plaintiff but the law firm as a whole including the legal assistants of M/s Gana Muthusamy & Co, should not appear nor act for the plaintiff in the present case – be it in chambers or in open court.

In his judgment Abdul Malik Ishak J said *inter alia* as follows:

> As I see It the preliminary objections can be divided into three parts. The first part would be barring Mr. Gana Muthusamy from representing the plaintiff be it in chambers or in open Court in the present case as he would be called as a witness by the defendant. The second part would bar the law firm of M/s. Gana Muthusamy & Co., to appear on record as solicitors for the plaintiff in the present case. The third part would bar the legal assistants of the law firm of Messrs. Gana Muthusamy & Co., from appearing or acting for the plaintiff be it in chambers or in open Court in the present case.

Abdul Malik Ishak J then said as follows:

> In my judgment, when Mr. Gana Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing he became a witness on these material and disputed questions of facts. By virtue of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules, Mr. Gana Muthusamy should be barred from representing the plaintiff be it in open Court or in Chambers. There are no concessions to be offered. The Rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The Courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the Court that will determine that right. There is a passage appearing in the judgment of Humphreys J in *R v. Secretary of State for India In Council and Others, Ex parte Ezekiel* [1941] KB D 546 that merits reproduction. It is this:
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> > There is a short observation which the other members of the Court desire me to make and with which I agree. It has been brought to the attention of the Court that, on the hearing at Bow Street, junior Counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as Counsel in the case. No objection was taken to this by Counsel on the other side. We think it right to point out that this was irregular and contrary to practice. A barrister may be briefed as Counsel in a case or he may be a witness in a case. He should not act as both Counsel and witness in the same case.

[12] In the case of *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113 which was also a decision by Abdul Malik Ishak J, preliminary objections arose because counsel in that case Mr T Rajagopalu deposed an affidavit which was filed purportedly to negate the plaintiff's averments. The plaintiff prayed that Mr T Rajagopalu be barred from representing the defendant. Counsel for the defendant submitted that the plaintiff has yet to file an application to cross-examine Mr T Rajagopalu and the issue of whether the latter would become a witness was irrelevant. His Lordship said *inter alia* as follows:

> Mr T Rajagopalu is personally involved in the whole episode. There would be every possibility that Mr T Rajagopalu might be cross-examined on his affidavit, a prerogative of the plaintiff and exercisable by her at any time.

A His Lordship also said:

> Mr T Rajagopalu may end up as a witness for the defendant and he would find himself caught under r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which states that an advocate and solicitor shall not appear in court or in chambers in any case in which
B he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest.

C His Lordship further said:

> Mr T Rajagopalu's status as counsel for the defendant would immediately change once the plaintiff seeks to cross-examine him in the witness-box. Must this court wait for that to happen? Certainly not. For the reasons adumbrated above, I allowed the plaintiff's preliminary
D objections with costs

[13] On the issue of r. 28(a) I considered the meeting between Datuk Naban and the plaintiff. I also take note that Datuk Naban spoke to the plaintiff as a friend (see encl. 6 para 24.4). By giving
E the 'friendly' advice that the plaintiff should leave KPMG, Datuk Naban made known his stand as to both the allegations made and the plaintiff's position in KPMG. In these circumstances and at the risk of repetition I refer to what Abdul Malik Ishak J said in the case of *Sykt Pengangkutan Sakti Sdn Bhd (supra)* where on the facts
F of that case His Lordship said "... When Mr. Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing, he became a witness on material and disputed questions of fact. By virtue of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Muthusamy should be barred from representing the plaintiff, be it in open court or in chambers, as he should not be
G allowed to be a witness for the defendant and counsel for the plaintiff at the same time" In the present case I am of the opinion that as a result of the meeting and discussion between the plaintiff and Datuk Naban and his advice to the plaintiff, by his act Datuk Naban became personally involved and he is likely to be a witness
H of material and disputed facts.

[14] The next issue is whether even if Datuk Naban cannot act, can other lawyers of LHAG act for the defendants? counsel submits that the counsel in this case is not Datuk Naban but Mr Lambert Rasa-Ratnam and Mr Sean Yeow. Though this may be the case I
I cannot ignore the fact that Datuk Naban is a senior partner in

LHAG, a position that is high in LHAG's organizational hierarchy. Mr Lim Heng Seng, Mr Lambert Rasa-Ratnam and Mr Sean Yeow are partners. The retainer here is LHAG, not Mr Lambert Rasa-Ratnam and/or Mr Sean Yeow. The proximity and relationship between Datuk Naban and counsels in LHAG raises a conflict of interest situation, (see *Lee Kam Sun v. Ho Saw Lin & Anor* [1999] 4 CLJ 507). As Abdul Malik Ishak J had said in *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing (supra)*:

> ... To allow the plaintiff's counsel or his legal assistant to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of clear words in s. 94(3) (n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute .... The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right (*R v. Secretary of State for India in Council & Ors, ex parte Ezekiel* [1941] KB D 546).

I also refer to what Lim Beng Choon J had said in *PP v. Vengadasalam & Ors (supra)* "... the presiding court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial". For the above reasons I therefore allowed the plaintiffs application with costs.